IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1001

EUGENE McCARTHY,
Petitioner,

v.

THE FEDERAL COMMUNICATIONS COMMISSION,
AMERICAN BROADCASTING COMPANIES, INC.,
CBS, INC., NATIONAL BROADCASTING SYSTEM, INC.,
PUBLIC BROADCASTING SYSTEM, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to the U.S. Court of Appeals for the District of Columbia Circuit

to review that Court's summary affirmance on 22 Oct. 1976 of the Order of the Federal Communications Commission of 5 Oct. 1976 concerning the participation of Eugene McCarthy in the 1976 Presidential Debates.

OPINIONS BELOW

The majority opinion of the Federal Communications Commission appears as Appendix A. The dissenting opinion of Commissioner Hooks appears as Appendix B. The order of the Court of Appeals denying injunction before the second debate, but setting an accelerated schedule for decision on the merits, appears as Appendix C. The summary affirmance of the FCC by the Court of Appeals, review of which is sought, appears as Appendix D.

JURISDICTION

Jurisdiction of the Court is based on 28 USC 1254(1). For the reasons set out in the argument below, Petitioner submits that the decision in this case will directly affect many of the elections for President and Vice President of the United States for the foreseeable future, and it therefore is a case of the gravity and general importance which has traditionally led this Court to grant a Writ of Certiorari.

QUESTIONS PRESENTED

1. Did *Aspen Institute,* 55 FCC2d 697, and *Chisholm v. FCC,* No. 75-1951 (D.C. Cir., 12 Apr. 1976), *rehearing and rehearing en banc denied,* 13 May 1976, *cert. denied,* ____ U.S. _____ , (12 Oct. 1976) decide that a Presidential Debate, under 47 USC 315(a), may include only the

Republican and Democratic candidates, or did those decisions determine only that such a debate need not include all known Presidential candidates?

2. If the answer to Question 1 is that *Aspen* and *Chisholm,* established only a ceiling of less than all candidates, but did not establish a floor of minimum participants, does the FCC possess power delegated from Congress to set standards for minimum participants?

3. On the facts of the campaign of 1976, has the FCC violated the U.S. Constitution, Amendments I and V, by delegating to the broadcasters, in a manner allowing them to further delegate to Republican and Democratic candidates, the decision that only the Republican and Democratic candidates would participate in the Presidential Debates?

4. Is the setting by the FCC of a different standard for Presidential Debates than for those for any other office a violation of the U.S. Constitution, Amendments I and V?

5. If the Court concludes that there was a Constitutional violation regarding participation by Eugene McCarthy in the 1976 Presidential Debates, should the relief include:

a. The ordering of equal time?

b. Declaratory judgment and remand to the FCC, allowing reasonable time for it to set standards for minimum participation? and/or

c. Declaratory judgment, with reasonable time for Congress to amend the statute in accord with the opinion of this Court?

HISTORY OF THE LITIGATION

The present litigation began with *McCarthy, et al v. Carter, et al,* (U.S. D.C., D.C., No. 76-1697), filed on 10 September, 1976, shortly after Eugene McCarthy was informed that the League of Women Voters would not invite him to participate in the Presidential Debates.

On 17 September, 1976, the District Court dismissed that case, and appeal was immediately taken. (Parties in *Anderson v. Ford,* U.S.D.C., D.C., Case No. 76-1672, consolidated with *McCarthy v. Carter,* in District Court, took no appeal, nor other steps.)

On 21 September, 1976 the Court of Appeals for the District of Columbia Circuit ordered the Appellees to file written answers by noon, 22 September, 1976, and it issued its Order denying injunction pending appeal at 5:30 p.m. on that date (Case No. 76-1865). No further activity has occurred in that appeal.

The first debate was conducted as scheduled (except for the 28-minute silence), in Philadelphia on 23 September, 1976.

McCarthy then filed the FCC complaint, against the three networks in the *Carter* case plus the Public Broadcasting System, on 24 September, 1976. The FCC decision was handed down on 5 October, 1976.

The FCC decision was appealed the same date to the Court of Appeals (Case No. 76-1915), and McCarthy moved that the Court of Appeals consolidate the two cases, and

grant an injunction prior to the second debate. Consolidation was denied, and injunction prior to the second debate was also denied. McCarthy also filed a Petition for Writ of Certiorari to this Court *prior* to judgment, which was denied, in No. 76-484, Oct. Term, 1976, 5 Oct. 1976.

The second debate was conducted as scheduled in San Francisco on 6 October, 1976.

The Court of Appeals did, however, set an accelerated schedule for full briefing and decision on the merits in *McCarthy v. F.C.C.*. The briefing schedule was complied with, and the Court of Appeals summary affirmance of the F.C.C. decision was issued on 22 October, 1976, the morning of the third debate.

McCarthy then requested an injunction pending Writ of Certiorari from Chief Justice Burger, which was denied the same date, no. A-321, Oct. Term, 1976.

The third debate was conducted as scheduled in Williamsburg on 22 October, 1976.

This petition now follows.

STATUTES INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. §315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal

opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any –

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The other statutes which form part of the pattern of Federal law on presidential candidates and elections, which

the Petitioner believes this Court should consider in applying *Aspen* and *Chisholm* to the facts of this case are as follows:

26 USC §9002. *Definitions.*

***

"(6) The term 'major party' means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 25 percent or more of the total number of popular votes received by all candidates for such office,

"(7) The term 'minor party' means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office,

"(8) The term 'new party' means, with respect to any presidential election, a political party which is neither a major party nor a minor party,"

26 USC § 9004, *Entitlement of Eligible*

Candidates to Payments.

"(a) *In general.* – Subject to the provisions of this chapter –

"(1) The eligible candidates of each major party in a presidential election shall be entitled to equal payments under section 9006 in an amount

which, in the aggregate, shall not exceed the expenditure limitations applicable to such candidates under Section 608(c)(1)(B) of title 18, United States Code.

***

"(3) The eligible candidates of a minor party or a new party in a presidential election whose candidate for President in such election receives, as such candidate, 5 percent or more of the total number of popular votes cast for the office of President in such election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by such candidate in such election bears to the average number of popular votes received in such election by the candidates for President of the major parties. In the case of eligible candidates entitled to payments under paragraph (2), the amount allowable under this paragraph shall be limited to the amount, if any, by which the entitlement under the preceding sentence exceeds the amount of the entitlement under paragraph (2)."

The general powers of the Secret Service are specified in 18 USC §3056. Their specific authority to protect "major" presidential candidates is uncodified, but found in Public Law 90-331, enacted 6 June, 1968, §§1-3, 82 Stat. 170, providing:

> "Section 1. (a) the United States Secret Service, in addition to other duties now provided by law, is authorized to furnish protection to persons who are determined from time to time by the Secretary of the Treasury, after consultation with the advisory committee, as being major presidential or vice presidential candidates who should receive such protection (unless the candidate has declined such protection).
>
> (b) The advisory committee referred to in subsection (a) shall consist of the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority leader of the Senate, the minority leader of the Senate and one additional member selected by the other members of the committee."

REASONS FOR GRANTING THE WRIT

In the Presidential Election of 1976, only 53.3% of the eligible electorate bothered to vote for President. The polls uniformly indicated that the reasons for the lowest percentage turnout in half a century was a relatively high level of distrust and disrespect for the Republican and Democratic Parties. Nonetheless, the broadcast of the Presidential Debates, involving only the candidates for those Parties, gave the electorate the impression that these were the only two candidates with a possible chance of victory, and for whom a vote could be effectively cast.

Under the Federal Election Funding Act, as a result of the election of 1976, in 1980 only the Republican and Democratic parties will qualify as "major" parties, receiving millions of dollars for their conventions, and tens of millions of dollars for their presidential campaigns. Under the ruling of the F.C.C. at issue here, and unless it is changed by this Court, in 1980 the Republican and Democratic candidates can again agree to debate each other, excluding all challengers, and the broadcasters can again adopt and enforce that

exclusion, presenting the candidates of those two parties as the only realistic candidates for President.

It also seems apparent from the interlocking effect of the Federal Election Funding Act, and of this ruling by the F.C.C., that the shared monopoly of the presidency by the Republican and Democratic parties will continue *ad infinitum.*

The most compelling reason why this Court should grant the Writ in this case is that it is clear that the issue of the Constitutional right of challengers for the Presidency to participate in Presidential Debates, will inevitably arise again. There will be more candidates like Theodore Roosevelt in 1912, Robert LaFollette in 1924, Henry Wallace in 1942, George Wallace in 1968, and Eugene McCarthy in 1972.

The issue will probably arise in mid-September, 1980, when the Republican and Democratic candidates again agree to debate, and the broadcasters again agree to cover the debates, accepting the exclusion of all other candidates, and other conditions as well. There will then be a matter of weeks before the first such debate, and only two months before the election itself, for the FCC to decide the complaint of the excluded challenger, the Court of Appeals to review that decision, and this Court to review that decision. It is self-evident from the history of the instant case that such an accelerated schedule provides too little time for thorough and considered judgment by any one of those decision-makers, much less by all three of them.

This Court has fashioned a principle, in cases involving politics and pregnancy, where the gestation period of the problem is too short for normal appellate review, but it will

continue to arise, that this Court will assume jurisdiction, and decide such issues, not holding the matter moot. See *Storer v. Brown,* 415 US 724 (1974), and *Roe v. Wade,* 410 U.S. 113 (1973).

If this Court feels there is any possible merit in the claim of Eugene McCarthy, and in the inevitable claims of other such candidates in the future, it should grant the Writ of Certiorari in the instant case in order to have ample time for briefing and argument of this case, and for such actions as the FCC might be ordered to take, or Congress might choose to take, in light of this Court's decision.

It is also true that only by reviewing and deciding a case such as this after the election does the Court know that its decision will be free of the personalities of the competing candidates, and of the question of who ought to be elected.

In short, the issue presented in this case is of great national importance, and it deserves the considered and unhurried consideration of the this Court, and subsequently of the FCC and/or the Congress, for satisfactory resolution. As a practical matter, it can receive that kind of consideration only after the election, which is the posture of the instant case, but will not be the posture of the next such case. For this reason, as well as those stated below, the Petitioner respectfully submits that this Court should grant the Writ of Certiorari.

Aspen and Chisholm Only Established a Ceiling for the Exclusion of "Fringe" Candidates from Presidential Debates.

Throughout his pleadings and memoranda in all aspects of the instant case, Eugene McCarthy assumed that *Aspen* and *Chisholm* represented the correct law. This was not a matter of prescience, that he expected this Court to deny certiorari on *Chisholm* while this case was pending. Rather, the Petitioner recognized and agreed with the wisdom of the Congressional purpose found as the basis of *Aspen* and *Chisholm.*

Both decisions quote members of Congress repeatedly as saying that the most important general form of political communication, namely television, and the most important single part of such communication, namely debates, were foreclosed to the American public by the so-called *Lar Daly* rule. Congress felt that equal time for all conceivable candidates for President, if any debate were held, was against the public interest. As Congress, the FCC, and Court of Appeals put it, the former requirement that all "fringe" candidates receive equal time meant, as a practical matter, that there could be no Presidential Debate presenting "serious" or "major" candidates to the American people.

The FCC, in *Aspen,* displayed exactly what it was doing in that decision, by overruling two prior decisions, and by restricting *Aspen* to the facts of those two prior decisions. The overruled decisions were *The Goodwill Station, Inc.,* 40 FCC 362 (1962); *National Broadcasting Co.,* 40 FCC 370 (1962).

In both of the overruled decisions, a broadcaster had requested the opinion of the FCC as to whether he could carry a debate of less than all of the candidates for the offices in question, without being subject to the equal time requirement for all candidates for those offices. In neither of those cases did a candidate who was not scheduled to take part in the debate present any facts to show that he was a "serious" candidate rather than a "fringe" candidate, and therefore entitled either to participation, or to equal time after the debate. Nor did Representative Chisholm offer such facts in her case. In short, the issue raised by the instant case was not present either in *Aspen,* or in the two cases which it specifically overruled.

The FCC decided in *Aspen,* and this Court agreed by denying *certiorari* in *Chisholm,* only that a Presidential Debate can exclude "fringe" candidates and be broadcast without violation of Section 315(a).

Aspen and *Chisholm* only established that the ceiling for participation may be less than all. They did not consider whether the floor of participation may be only two candidates, regardless of the facts of any additional candidate's claim to be a major or serious candidate.

The FCC has Discretionary Power, Granted by Congress, to Set Standards for Minimum Participation in Presidential Debates.

The gist of *Aspen* and *Chisholm* is that Congress established the FCC for the specific purpose of developing and applying expertise with regard to television and radio broadcasters, and within that expertise to exercise wide discretion in interpreting Section 315(a).

According to those two opinions, the guidance which Congress gave to the FCC with regard to Presidential debates is that the FCC should act to maximize the opportunity for the American people to hear "serious" or "major" candidates in a debate setting, without such a debate being made impossible by the automatic inclusion of all of the "fringe" candidates.

The FCC clearly gratified both the power it possessed and the public policy in deciding in *Aspen* that a Presidential Debate could be broadcast with less than all so-called candidates included.

Petitioner submits, quite simply, that the same power of the FCC, and direction from Congress found in *Aspen* and *Chisholm*, are required for the FCC to establish under its rule-making powers, the standards for determination as to which candidates are "fringe", and can therefore be excluded, and which are "major" or "serious" candidates, and must therefore be included, or receive equal time.

This Court's denial of certiorari in *Chisholm* is an affirmation that the FCC has both the power and the obligation to make the determination here requested.

Eugene McCarthy Was a Serious and Major Candidate for President in 1976, and His Exclusion from the Debates Violated Amendments I and V to the U.S. Constitution.

The FCC decision on Eugene McCarthy's complaint was that the broadcasters had displayed "bona fide news judgment" in deciding to cover the Presidential Debates, and

that therefore there was no violation of 315(a) under *Aspen*. In reaching its decision, the FCC ignored the additional criterion of "no evidence of broadcaster favoritism" found in both *Aspen* and *Chisholm*. (See *Aspen, supra*, 55 FCC2d at 705, 707-708; and *Chisholm, supra*, slip opinion, at 4 and 21.)

The FCC decision in the instant case was based on the deliberate assumption of an untruth, namely, that the Presidential Debates of 1976 would have occurred in any case (with or without television), and that the broadcasters simply exercised their ordinary decision-making in deciding whether to cover these events. Commissioner Hooks displayed what Robert Frost called "a keen eye for the obvious," in stating in no uncertain terms that "the world-at-large" knows that the debates took place because, and only because, of the commitment of the broadcasters to cover them.

The only sworn testimony in the proceedings below are two affidavits from Eugene McCarthy. In one he states that based on his 25-year experience in holding national elective office, and in campaigning for the Presidency, that neither Gerald Ford nor Jimmy Carter would have agreed to debate the other, absent the assurance that the debates would be covered on television. No evidence was ever presented to support a finding that the debates would have taken place without television coverage.

The affidavits also established that Eugene McCarthy was the only candidate (other than Ford and Carter) who a) had Secret Service Protection, b) was qualified on the ballot in states with a majority in the Electoral College, and c) showed more than 5% support in pre-election polls. All these

characteristics put McCarthy in the category with Roosevelt, Wallace, Wallace and LaFollette, rather than in the category with the balance of the some 89 would-be candidates for President in 1976.

This Court has a precedent for the conclusion that a judgment which has no basis whatsoever in fact, must be overturned. *Thompson v. Louisville,* 362 US 199 (1960), 80 ALR2d 1355.

Judge MacKinnon of the Court of Appeals also displayed "a keen eye for the obvious" in his dissent from the Order setting accelerated schedule for hearing (Appendix C). Judge MacKinnon took the statement from the CBS brief, which is common to the briefs for all of the broadcasters, that they, in exercising news judgment, can determine the importance of a particular candidate and his views, and therefore adjust their coverage accordingly. He concluded that such decisions by broadcasters become self-fulfilling prophesies. But his final conclusion was that the remedy lay only with Congress.

It is this ultimate conclusion, that relief lies only with Congress, that Petitioner quarrels here. In its most important decision in its history, this Court long ago decided that when Congress passes a law (or in the present tense, makes a delegation of power to an agency) which violates the Constitution of the United States, it is not only within the power of this Court, but is also its obligation, to strike down such a law (or such a delegation). *Marbury v. Madison,* 1 Cranch. 137, 2 LEd 135 (1803).

This Court should not "shut [its] eyes to what all others . . . can see and understand," *U.S. v. Butler,* 297 US 1,

at 61 (1936). The facts of the 1976 Presidential Debates are that Ford challenged Carter only, and Carter accepted the challenge of Ford only, and that both laid down certain conditions for the conduct of the debates which were ultimately, albeit with some objections, accepted by the networks.

The broadcasters have consistently claimed that their authority to do what they did was derived from the *Aspen* opinion of the FCC, as affirmed in *Chisholm.* Congress is without power to pass a law stating that the right to participate in Presidential Debates shall be the exclusive and indefinite property of the Republican and Democratic Parties jointly. Congress cannot delegate to the FCC a power which Congress lacks; and likewise, the FCC cannot delegate to the broadcasters a power which the FCC lacks. Nor can the broadcasters further delegate that decision to two of the candidates.

It requires only one more self-evident fact to complete the argument. As the history of elections in the United States demonstrates, in the last 100 years since the Republican and Democratic parties began their joint dominance of the Presidency, in any election where there is a strong challenger, capable of drawing substantial support, one or the other of these two parties saw themselves as being hurt by such a candidate, and the other being helped. It is axiomatic that any such candidate, who perceives the danger, will do the best he can to minimize it. It will always be in the interest of either the Republican or the Democratic candidate to limit as much as possible the efforts of the next nearest challenger.

Since, under our Constitution, the freedom of speech also includes the freedom not to speak, Presidential Debates can only take place by consent, not compulsion. If there are to be only two participants, either can prevent the debates from taking place, by refusing his consent. Whichever candidate feels threatened by the presence of a third candidate, will condition his consent on the exclusion of that third candidate.

(Petitioner adds that such discrimination is constitutional unless broadcasters and the FCC contribute to it. But as discussed, debates in this century take place only if televised.)

It follows that unless the FCC decision with respect to Eugene McCarthy is reversed by this Court, no challenger, regardless of his popular appeal and support, will either take part in Presidential Debates, or receive equal time for his exclusion from them. It is this ultimate result, not just in 1976, but in all elections to come, that the Petitioner submits is a grave violation of the Constitution. See also, *The Federalist Papers*, No. 68.

Lastly, this Court has recognized circumstances in which separate is inherently unequal. *Brown v. Board of Education*, 347 U.S. 483 (1954). This Court has also recognized that the effects of exclusion under color of law are equally reachable under Amendment V (which applies to the District of Columbia and the FCC, for instance) as under Amendment XIV. Compare *Bolling v. Sharpe*, 347 U.S. 497 (1954), companion case to *Brown*. And compare: *Lubin v. Panish*, 415 US 709 (1974); *Storer v. Brown*, 415 US 724 (1974); *Westberry v. Saunders*, 376 US 1 (1964); and *McCarthy v. Exon*, (USDC, Neb., No. 76-L-166, *summarily aff'd*, ____ U.S. _____ No. 76-492, 29 Nov. 1976).

The Establishment by the FCC of Different Standards for Participation in Presidential Debates Than for Any Other Office Violates the Constitution, Amendments I and V.

The FCC ruling in *Aspen* restricts itself in terms to Presidential Debates and Presidential news conferences. While that opinion overrules two prior opinions having to do with debates other than for President, by the restrictions in *Aspen* itself the FCC has left standing the *Lar Daly* rule with respect to debates for any office other than President.

Approximately 500,000 people are elected to various political offices in the United States every four years. (*Citizens Research Foundation*, Princeton, N.J.) Only two of that half a million total of elected officers constitute the President and Vice-President, covered by *Aspen* and *Chisholm*.

The Congressional purpose found in *Aspen* and *Chisholm* was to encourage the broadcast of debates involving "major" and "serious" candidates by keeping them from being rendered impossible, by the necessary inclusion of all of the "fringe" candidates. There is no necessary restriction in the legislative record that the people have a need to see and hear on television and radio only the Presidential candidates.

While it is self-evident that the election of the best possible President is more important than the election of the best possible candidate to any other single office, it should be equally self-evident that it is just as important to the American people that the sum-total of their national, state, and local officials be as thoughtfully selected as their President and Vice-President.

For these reasons, Petitioner submits that it is a violation of Amendments I and V of the Constitution for the FCC to set a different standard for participation of candidates in Presidential Debates, than in debates for all the other elective offices in the United States. Petitioner emphasizes that he will present this argument in his Brief, if Certiorari is granted, not to reimpose the *Lar Daly* rule on Presidential Debates, but, to the contrary, to abolish it for all other offices.

Relief for Eugene McCarthy Should Include Equal Time, Remand to the FCC, and/or Declaratory Judgment with Opportunity for Congress to Act.

It is not the sole message of any Presidential candidate that he should be elected, and his opponents rejected. It is clear that all candidates for President of the United States have offered some issues for consideration, issues which were important to the public, regardless of the fortunes of the candidates who raised them.

Eugene McCarthy is a classic example of this principle. In the lonely snows of New Hampshire in 1968 he pressed the issue of the national trauma of our participation in the Vietnam war. Despite the defeat of Eugene McCarthy in 1968, and again in 1972, ultimately his view was adopted by the American people, and prevailed.

In his entire quarter century in public office, and as a candidate for public office, Eugene McCarthy has been a persistent and articulate spokesman for many views which may have been in a minority when he raised them, but which were of legitimate interest to the American public. The campaign of 1976 is no exception on issues. But it is very much the exception in the coverage he received.

This Court has explicitly recognized in prior decisions the fact that the vitality of the American political system does not depend solely on the success of challenging candidates, but on the issues which such candidates raise, and the ultimate success of those issues. See *Jenness v. Fortson*, 403 US 431 (1971), footnote 25; see also *Williams v. Rhodes*, 393 US 23, at 31-32 (1968).

With these ideas as preface, it is clear that part of what Eugene McCarthy was campaigning for in 1976 remains a matter of public interest. Equal time for the points he raises concerning national issues (rather than why he, personally, should be elected) is still an appropriate and necessary remedy for his exclusion from the televised debates. He therefore seeks either an Order from this Court granting him equal time for his issues, as opposed to those raised by both Ford and Carter, or in the alternative, a remand to the FCC to determine what would be the appropriate amount of equal time.

Relief to affect future elections and future candidates in the position of Petitioner, can take one of two forms. If the Court is satisfied that the FCC possesses discretionary power to set standards for the minimum participation in Presidential (and other) debates, it can remand to the FCC for them to use their rule-making power.

Petitioner would suggest that a year would be reasonable time for such FCC action, and would also allow time for ample review by the Court of Appeals, and possibly this Court again, of such determinations as the FCC or Congress might make, for the process to be completed well before the 1980 Presidential election.

The second alternative is for this Court to order the Court of Appeals to issue a declaratory judgment that what was done with respect to Eugene McCarthy was unconstitutional, and to allow a reasonable time for the Congress to act in order to modify Section 315(a) to set its own standards for those who are major or serious candidates, entitled to participate in debates, or to receive equal time, and those who are not. While no Court can remand to Congress, Congress might choose to act while the matter is pending in the FCC.

RELIEF SOUGHT

A brief discussion of the kinds of relief which might be appropriate in the instant case appears in the preceding section. Petitioner emphasizes here only that the experience of the two instances of Presidential Debates in 1960 and in 1976, demonstrate that a face-to-face debate is an unique opportunity for the potential voters to see all of the serious candidates, and to compare them, one to another. It is the only part of any Presidential campaign in which a voter with strong preconceptions cannot exercise self-selection by turning the channel, or leaving the room, to avoid candidates he dislikes, while watching ones he likes.

The history of the debates of 1960 and 1976 also demonstrates that the holding of such a debate, in and of itself, represents to the American public that only those who participate in that debate should be seriously considered for the Presidency. For all of these reasons, relief granted to the Petitioner here, though no longer able to gain votes for him, is of overriding importance to present issues and future candidates and issues, and therefore to the political health of the Republic.

Respectfully submitted,

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APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 76-924

In re Complaints of	:
The American Independent Party	:
against	:
American Broadcasting Companies, Inc.	:
and	:
CBS, Inc.	:
and	:
National Broadcasting Company, Inc.	:
and	:
Eugene McCarthy	:
against	:
American Broadcasting Company, Inc.	:
and	:
CBS, Inc.	:
and	:
National Broadcasting Company, Inc.	:
and	:
Public Broadcasting Service	:

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1976; Released: October 5, 1976

By the Commission: Commissioner Lee concurring; Commissioner Hooks dissenting;* Commissioners Fogarty and White not participating.

1. The Commission has under consideration a complaint and an Application for Review of the Broadcast Bureau's

* Statement to be issued at a later date.

September 17, 1976 ruling (____ FCC 2d ____ (72346; C9-426)), filed on September 24, 1976 by the American Independent Party (AIP) on behalf of its Presidential candidate, Lester Maddox;[1] a complaint filed by independent Presidential candidate Eugene McCarthy on September 24, 1976; and oppositions to the AIP and McCarthy complaints filed by the American Broadcasting Co. (ABC), the National Broadcasting Co. (NBC), and the Public Broadcasting Service (PBS) on September 30, 1976, by CBS, Inc. (CBS) on October 1, 1976; and a reply to the opposition filed October 1, 1976 by AIP.[2]

2. In his initial complaint in this case Maddox had requested that the Commission order broadcasters not to broadcast debates between Republican Presidential candidate Gerald Ford and Democratic Presidential candidate Jimmy Carter unless Maddox was allowed to participate, or, if he were

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[1] The AIP Application for Review contains both a request for review of the Broadcast Bureau's rejection of Maddox's 'equal opportunities complaint and a new complaint concerning the application of the fairness doctrine to candidate appearances not subject to equal opportunities. Section 5(d) (5) of the Communications Act provides in pertinent part that no Application for Review "shall rely on questions of fact or law upon which the . . . [designated authority] has been afforded no opportunity to pass." Therefore the Application for Review must be dismissed. However, we will handle the AIP pleading as an initial complaint, to be considered in conjunction with a review of the Broadcast Bureau's ruling on our own motion pursuant to Section 1.117 of our rules.

[2] The Commission has received extensive pleadings totaling 255 pages. Therefore only the major relevant facts and arguments are summarized here. However, all facts and arguments were considered by the Commission in making this decision.

not allowed to participate, that the Commission order the broadcasters to give him "equal time without cost."

3. In its September 17, 1976 ruling the Broadcast Bureau, in accordance with its delegated authority, stated that the Commission is "prohibited by the First Amendment to the Constitution and Section 326 of the Communications Act from censoring broadcast matter" and therefore "cannot order any licensee or network not to broadcast a debate between the Democratic or Republican Presidential candidates, or any other program." The Bureau further stated that under the Commission's ruling in *Aspen Institute*, 55 FCC 2d 697 (1975), affirmed sub. nom. *Chisholm et al. v. FCC*, ____ F 2d ____ (No. 75-1951, April 12, 1976), "where a debate between two candidates is arranged by an independent party not associated with any candidate or broadcaster and is broadcast . . . in its entirety, the broadcast of such debate is 'on-the-spot coverage of a bona fide news event' within the meaning of the exemption contained in Section 315(a)(4), and would thus not be subject to equal opportunities"; that Maddox had not provided any specific information to support his claim that the Ford/Carter debates did not satisfy the *Aspen Institute* criteria to come within the exemption; and that Maddox was therefore not entitled to equal opportunities.

4. In seeking review of the Bureau's ruling AIP states that under the *Aspen Institute* ruling, in order to come within the 315(a)(4) exemption, a debate "must be under the exclusive arrangement and control of an independent party not associated with either the opposing candidates or broadcasters," must be broadcast in its entirety, and must "not be 'designed [by broadcasters] to promote the interests of the candidate' "; that because of the "extraordinary nature" of the Ford/Carter debates, a refusal by broadcasters to "provide substantial coverage" to other "signficiant candidates" would have "the reasonable effect, and therefore design, of promoting only the interests of the covered candidates"; that there was "substantial evidence" to show that the debates were not organized by the

League of Women Voters, but were instead organized by the Public Broadcasting Service; that the candidates themselves exercised control over certain material aspects of the debate arrangements, including selection of interviewers and format, and therefore the networks could not "exercise full journalistic discretion" in covering the debates; that the debates are actually " 'panel discussions' not covered by the exemption"; that the debate which occurred on September 23, 1976 came to a "temporary halt for 28 minutes" when the television audio coverage was lost, thus showing that "the League and the networks were not acting separately as sponsor and broadcaster in presenting and covering the event"; that, if the debates should come within the 315(a)(4) exemption, the "networks' responses to Maddox largely ignored their 'backup' Fairness Doctrine obligations to cover his candidacy by providing a reasonable amount of broadcast time to the coverage of contrasting *viewpoints* as to who should be elected President"; that, "based on actual viewing experience," Maddox had received "some coverage" on all three networks but that coverage was "manifestly inadequate in absolute terms and vastly disproportionate in quantity and quality"; that Maddox is a "significant candidate" because he is on the ballot in 30 states and has a "numerical ability" to be elected; and that the Commission should therefore rule that under the fairness doctrine the networks devote "substantial amounts" of coverage to "*significant* independent Presidential and Vice Presidential candidates."

5. In his complaint Eugene McCarthy states that the Commission's ruling in *Aspen Institute* held that "broadcasters may carry presidential debates involving 'major' or 'serious' candidates, free of equal time or fairness restrictions, subject to certain conditions"; that those "conditions have been broken," resulting in "both an equal time and a fairness doctrine violation"; that he is a " 'major' or 'serious' candidate because he has "measurable support" and a "mathematical chance" of being elected; and that the Commission should rule that "the exclusion of any 'major' or 'serious' candidate

from any future presidential debate," takes the debate outside the "on-the-spot coverage of a bona fide news event" as defined in *Aspen Institute*.

6. In its responses to both the Maddox and McCarthy complaints, ABC states that the debates were sponsored and organized "solely by the League of Women Voters"; that it had not participated in or exercised any control over the establishment of the format or selection of interviewers for the debate, nor did it have any control over the temporary halt of the September 23 debate during the audio failure; that the audio failure affected both the television transmission and the public address system in the hall where the debates took place and under such circumstances a "halt of the proceedings" would not affect the "exempt status" of the event; that there is no support for the claim that *Aspen Institute* requires that all " 'major' or 'serious' candidates" be included in a debate for the debate to be exempt; that, with reference to the fairness doctrine aspect of the complaints, the Commission may not order a broadcaster to cover a particular candidate in a particular format; that ABC had given news coverage to Maddox and McCarthy; and that ABC's news coverage of the Presidential candidates is "based on the exercise of good faith news judgments."

7. In its responses to these complaints, NBC states that its coverage of the debates is exempt from equal opportunities obligations as "on-the-spot coverage of a bona fide news event" under *Aspen Institute*; that NBC is broadcasting the debates not for the purpose of "advanc[ing] a particular candidacy but in the exercise of its 'reasonable news judgment' "; that NBC exercised no control over the organization, format, or interviewers for the debates or the temporary 28-minute halt due to audio failure; that the news coverage afforded to Maddox and McCarthy by NBC is based on its "independent editorial judgments as to the interest of the public in the various candidates"; and that NBC has provided "substantial coverage" to both the Maddox and McCarthy candidacies and neither complainant has provided sufficient information to show that NBC was

unreasonable in determining that the candidacies of McCarthy and Maddox are not sufficiently significant to warrant more coverage under the fairness doctrine than that given or planned by NBC.

8. In its response to these complaints CBS states that its coverage of the debates is exempt from equal opportunities obligations as "on-the-spot coverage of a bona fide news event" under *Aspen Institute*; that the "decisive" factors in determining whether an event is exempt as "on-the-spot coverage of a bona fide news event" are "whether the broadcaster's decision to cover the debate is based on its good faith determination as to the event's newsworthiness' and whether the broadcaster (and not the candidate) exercised any "control" over the debate; that CBS broadcast the debate because of its obvious newsworthiness, and not for the purpose of promoting the interests of any candidate; that CBS did not exercise any control over the organization or format of the debate or the 28-minute halt due to audio failure; that in fulfilling its fairness doctrine obligations with regard to news coverage of candidates, "a broadcaster is only required to make reasonable judgments in good faith as to the significance of a particular candidate and so decide how much time should be devoted to coverage of his campaign activities," (quoting from *U.S. Labor Party*, 57 FCC 2d 1273 (1976)); and that CBS's news coverage of Maddox and McCarthy "is fully consistent with its obligations under the fairness doctrine," and neither has submitted any specific information to show that CBS'news judgments are unreasonable.

9. In its response to McCarthy's complaint PBS states that the debates are exempt from equal opportunities under *Aspen Institute*; that it did not exercise any "role in the establishment or structuring of the debates" nor any control over the temporary 28-minute halt in the debate due to the audio failure; that *Aspen Institute* did not hold that all "major" candidates had to participate for a debate to qualify for the exemption; that PBS "exercise[d] its good faith news judgment

that the debates were newsworthy events and should be covered"; and that, in view of PBS' coverage of McCarthy's candidacy there was no violation of the fairness doctrine.

DISCUSSION

10. The "equal opportunities" provision of Section 315 was originally intended by Congress "to assure a legally qualified candidate that he will not be able to acquire unfair advantage over an opponent through favoritism of a station licensee in selling or donating time or in scheduling political broadcast[s]." S. Rep. 562, 86th Cong., 1st Sess., July 22, 1959, pp. 8-9. However, as a result of the 1959 "Lar Daly" case, in which the Commission ruled that the equal time provision was applicable even to an appearance by a candidate on a regularly scheduled newscast, Congress stated that a "rigid interpretation of equal opportunity under Section 315" to news-type programs would "constitute a deterrent to stations permitting the use of their facilities by legally qualified candidates" because stations would be "reluctant to show one political candidate in any news-type program lest he assumes the burden of presenting a parade of aspirants." *Id.* at 9. Congress stated that

> [a]n informed public is indispensable for the continuance of an alert and knowledgeable democratic society. The public should not be deprived of the benefits that flow from this dynamic form of communications during the critical times of a campaign. The public benefits are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters. *Id.* at 10.

Thus, Congress enacted the "bona fide news" exemptions in order to accomplish two objectives:

> First, the right of the public to be informed through broadcasts of political events; and Second, the discretion of the broadcaster to be selective with respect

to the broadcasting of such events. *Hearings on Political Broadcasts-Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess., 1959, p. 2 (comments of Chairman Harris).

11. In *Aspen Institute* the Commission sought to effectuate the Congressional objectives of promoting "the right of the public to be informed through broadcasts of political events" and allowing broadcasters "discretion . . . to be selective with respect to the broadcasting of such events" by overruling two prior cases, *The Goodwill Station, Inc.*, 40 FCC 362 (1962); *National Broadcasting Co.*, 40 FCC 370 (1962), so that the broadcast of debates between candidates would be considered as "on-the-spot coverage of a bona fide news event" exempt from equal opportunities requirements "under the circumstances covered by" the 1962 cases cited above, i.e., where the debates were arranged by a party not associated with the broadcaster; where the debates are broadcast live and in their entirety; and where the broadcaster determines to cover the debates based on his reasonable, good faith journalistic judgment of the newsworthiness of the event and not for the purpose of serving the political interest of one of the candidates.[3]

12. In enacting the "bona fide news" exemptions, Congress also recognized that "[i]t is difficult to define with precision what is . . . on-the-spot coverage of a bona fide news event" and therefore "carefully gave the Federal Communications Commission full flexibility and discretion to examine the facts in each complaint" in order to "determine on the facts submitted in each case whether . . . on-the-spot coverage of a

[3] It should be noted here that the *Aspen* ruling did not establish any requirement that all so-called " 'major' or 'serious' candidates" participate in a debate for that debate to come within the exemption.

news event . . . is bona fide or a 'a 'use' of the facilities requiring equal opportunity." S. Rep. 562, *supra* at 12. Consequently, while *Aspen Institute* establishes certain criteria which, when satisified, bring a debate between candidates within the "on-the-spot coverage of a bona fide news event" exemption, when presented with a factual situation different from that in *Aspen* the Commission need not rely on a rigid application of that decision, but instead has a responsibility to consider the new facts and render a decision consistent with the Congressional intent. Thus, in *Delaware Broadcasting Company, (WILM)*, ____ FCC 2d ____ (FCC 76-873, September 21, 1976), the Commission re-examined the *Aspen* requirement which was based on the circumstances of the *Goodwill* and *NBC* cases, that a debate be broadcast *live*, and concluded that a delay of no more than one day in the broadcast of a debate "does not necessarily remove the Section 315 exemption from that broadcast."

13. AIP characterizes the *Aspen* ruling as requiring that a debate "must be under the exclusive arrangement and control of an independent party not associated with either the opposing candidates or broadcasters," and asserts that, since Ford and Carter did exercise control over certain material aspects of the debate arrangements, including selection of interviewers and format, the debates did not come within *Aspen* and were therefore not exempt. The initial question for determinaton here is whether the exercise of such control by the debating candidates would take the debate outside the "on-the-spot coverage of a bona fide news event" exemption and make it subject to equal opportunities. We believe that the legislative history of the bona fide news exemption makes it clear that such candidate input into the debate arrangements would not remove the debate from the 315(a)(4) exemption. The United States Court of Appeals for the District of Columbia, in affirming the Commission's ruling in *Aspen*, expressly approved this view. As the above quotations from the legislative history of the exemptions indicates, in enacting those exemptions Congress was concerned with and focused on the role of the

broadcaster in exercising journalistic discretion presenting news on political news as opposed to "serv[ing] the political advantage" of a candidate. Section 315 was originally enacted to prevent "favoritism *of a station* in selling or donating time or in scheduling political broadcast[s]." (Emphasis added) S. Rep. 562, *supra* at 8-9. One of Congress' expressed goals in enacting the exemptions was to afford discretion to *broadcasters* in the selection of political news events to be covered (*Hearings on Political Broadcasts-Equal Time, supra*), in spite of the possibility of "favoritism that may be shown by some partisan *broadcasters.*" (Emphasis added) S. Rep. 562, *supra* at 10. In discussing the specific inclusion of "political conventions and activities incidental thereto" in the "on-the-spot coverage of a bona fide news event" exemption, the United States Court of Appeals for the District of Columbia stated:

> We remain unconvinced by petitioners' arguments that these events [political conventions, debates and press conferences] are distinguishable based on the degree of control by the candidate, or the degree to, which candidates tailor such events to serve their own political advantages. It is more reasonable to believe, as the Commission apparently does, that *any* appearance by a candidate on the broadcast media is designed, to the best of the candidate's ability, to serve his own political ends. There is ample support in the legislative history for the Commission's conclusion that a *candidate's partial control over a press conference or debate does not, by itself, exclude coverage of the event from Section 315(a)(4).* (Emphasis added). *Chisholm et al. v. FCC, supra,* sl. op. at 20-21.

Moreover, the *Aspen Institute* ruling made no reference to candidate participation in the arrangement of a debate. Although *Aspen* specifically stated that in the Goodwill case "[n]either [candidate] had any part in establishing the format for the debate," in the *NBC* case a letter in the Commission's

files dated September 24, 1962 from UPI to CBS stated that the debatingin candidates and UPI had made an agreement concerning their appearances. As a practical matter it is unreasonable to assume that any candidate would agree to a debate without any input into the arrangements for the debate, such as date, duration, method of questioning, participants and subject matter, nor would such input destroy the newsworthiness of political candidates appearing before the public face-to-face to present their positions on the issues. Therefore, the fact that Ford and Carter had some say in the arrangements does not remove the instant debates from the 315(a)(4) exemption.

14. Thus the critical factor in determining whether a debate comes within the 315(a) (4) exemption is the role and the extent of the broadcaster in covering it. As indicated above, the broadcaster must determine to cover a debate based on its reasonable, good faith independent journalistic judgment as to the newsworthiness of the event and not for the purpose of "serv[ing] the political advantage of a candidate." We adhere to the position taken in *Aspen* that involvement of a *broadcaster* in the arrangement of a debate would raise questions as to whether the broadcast of that debate would come within the news exemption. AIP argues that there is "substantial evidence" that the debates were not organized by the League of Women Voters but instead were arranged by the Public Broadcasting Service. However the only "evidence" submitted to support this contention was an excerpt from a *Newsweek* magazine article dated September 27, 1976, which stated, in pertinent part, that the League "first got the idea of Presidential debates from public broadcasting producer Jim Karayn." AIP did not submit any information to show any official connection between Karayn and the Public Broadcasting Service, or to show that Karayn

or any other person acted on behalf of the Public Broadcasting Service in actually arranging the debates. In fact, Karayn is not now and never has been employed by the Public Broadcasting Service. He formerly was employed by public television station WNET, New York, New York and WETA, Washington, D. C., but has not been employed by a television station since August 1975. Thus it does not appear that any broadcaster participated in the debate arrangements in such a manner as to take the debates out of the 315 (a) (4) exemption.

15. Both complainants argue that the temporary 28-minute halt to the debate because of the loss of television audio coverage showed that "the League and the networks were not acting separately as sponsor and broadcasters in presenting and covering the event." This argument fails for two reasons. First, the microphones and speaker system in the hall where the debate was taking place were connected to the same pickup as the audio portion of the broadcast. Thus, when the audio portion of the broadcast halted, the sound system in the hall failed also. The fact that the candidates waited for the technical problems to be resolved so that both the television viewers and the live audience could hear them does not remove the debate from the 315 (a) (4) exemption. Second, as indicated above, the Commission must look to the role and the intent of the broadcaster in covering the event, since it is control of the debate by the *broadcaster* that would remove the debate from the 315 (a) (4) exemption. However, when the audio portion of the broadcast was lost, no *broadcaster* is shown to have exercised any control over the continuation or suspension of the debate or requested or required the candidates to halt. The candidates themselves determined to wait for re-establishment of the

audio portion of the transmission. Also, in a letter attached to the PBS pleading herein, the League stated that it attempted unsuccessfully to obtain use of the sound systems in the theatre so that the debate could continue without regard to the broadcast coverage. It cannot be said that under the foregoing circumstances the debate did not come within the 351 (a) (4) exemption.

16. AIP also argues that the debates are in fact "panel discussions" and are therefore not covered by the exemption. However AIP does not submit any information to justify its distinction between a "debate" and a "panel discussion" or to show that the event under consideration here is a "panel discussion" ineligible for the 315 (a) (4) exemption. Webster's Dictionary defines "debate" as "contention by words or arguments: as *a:* the formal discussion of a motion before a deliberative body according to the rules of parliamentary procedure [or] *b*: a regulated discussion of a proposition between two matched sides." Where there is such "contention by words or arguments" in a "regulated discussion" between two candidates, the event is clearly the type of event which will contribute to "the continuance of an alert and knowledgeable democratic society" as intended by Congress. S. Rep. 562, *supra* at 10. In the absence of a showing by AIP, considerably stronger than it has presented, that the Ford/Carter debates should not be considered "debates" within the 315 (a) (4) exemption, it would be inappropriate and in violation of the intent of Congress for the Commission to attempt to establish or sanction a particular qualifying format or structure as a "debate" to the exclusion of all other face-to-face confrontations between candidates.

17. In view of the above we cannot find that the networks were unreasonable in determining that the broadcast of the Ford/Carter debate was "on-the-spot coverage of a bona fide news event" exempt from equal opportunities.[4]

18. We now turn to the allegations of McCarthy and AIP that the networks have violated the fairness doctrine by the broadcast of the debates in question. The fairness doctrine provides that if a broadcaster presents a discussion of one side of a controversial issue of public importance it must afford a reasonable opportunity for the presentation of contrasting points of view in its overall programming.[5] There is no obligation under the fairness doctrine that "equal time" be afforded each side as would be the case where a candidate appears on a program subject to the "equal opportunities" requirement of Section 315 of the Communications Act. Rather, the broadcaster has the discretion to determine how best to present the contrasting viewpoints on the issue; thus, it may make determinations as to the significance of

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[4] Even if the debates were subject to equal opportunities, the complainants would not be entitled to be included in future debates. *Socialist Workers 1970 Campaign Committee*, 26 FCC 2d 38 (1970). The Commission could not compel the League of Women Voters to invite a particular candidate to participate in a debate, nor could it require any candidate to appear to debate another candidate.

[5] We would also emphasize that the broadcast of the debate in and of itself does not create separate fairness obligations on the part of the broadcaster independent of other programming which it might present. The Commission has often stated that it is the *overall* programming of the broadcaster which the Commission will review, not a particular program or series of programs. *Fairness Report*, 438 FCC 2d 1, 52.

contrasting viewpoints and decide which forum and format would be the most appropriate for the presentation of these views. The decisions of the broadcaster in these matters are subject to review by the Commission to determine whether they were made in good faith and are reasonable in light of all the facts presented.[6]

19. In an election for public office each candidate cannot be considered a separate controversial issue of public importance merely by reason of his or her candidacy or partisan campaign. Rather, the issue presented to the voters is who, among all the candidates, should be elected; the individual candidates represent contrasting viewpoints on that issue. Hence, under the fairness doctrine a broadcaster is required only to make a reasonable good faith judgment as to the significance of a particular candidate and decide how much broadcast coverage should be devoted to his candidacy and

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[6] This standard of review is to be distinguished from that which the Commission applies to complaints alleging "slanting or staging" of news. In those cases, as NBC notes, the Commission will not take action absent extrinsic evidence of deliberate distortion on the part of the licensee. The Commission has stated that in these situations it will not substitute its news judgment for that of the licensee. However, in fairness doctrine complaints, the Commission will, and indeed must review the news programming of the licensee, not to determine whether it is true or correct, but rather to discover whether contrasting viewpoints on an issue have been covered in the overall programming and whether that coverage was reasonable and in good faith.

campaign activities. *U.S. Labor Party, supra; Robert L. Miller,* ___ FCC 2d ____, Mimeo No. 68436 (Broadcast Bureau, July 27, 1976).[7]

20. The purpose of the fairness doctrine is to promote uninhibited, wide-open debate on the issues of importance to the listening and viewing public. As applied to the coverage of political campaigns, it is designed to insure that the public is aware of the significant candidates and issues involved in the election. In order to promote this discussion of issues, the Commission must be able to assure the broadcaster that his decisions as to the significance of particular candidates and the amount of coverage to be devoted to the campaigns of the candidates will not be disturbed absent a *prima facie* showing by a complainant that these decisions were unreasonable or were made in bad faith. We do not believe that either of the complainants here have made such a showing.

21. We also note that neither of the candidates has alleged that he contacted the networks before bringing his fairness doctrine complaint to the Commission. Such an allegation is one of the basic procedural requirements of the fairness doctrine (See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 F.R. 145 (1964)) and is essential to a showing by the candidate of a licensee's unwillingness to afford his campaign reasonable coverage. The Commission does not feel that it is appropriate to interfere in matters such as these before the

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[7] Contrary to the statement made by McCarthy in his complaint, the obligation under the fairness doctrine with respect to the broadcast of debates is not obviated by a finding by this Commission that the debates are exempt from the equal opportunities provision of Section 315. The Commission recently noted, through its Broadcast Bureau, that the fairness doctrine applies to all programming of the licensee *except* that which is subject to the equal opportunities provision of Section 315. *Gloria Sage,* ____ FCC 2d ____, Mimeo No. 71573 (Broadcast Bureau, August 30, 1976).

broadcaster has had an opportunity to accommodate the wishes of the candidate through negotiations directly with him. In addition, the complainants have not demonstrated that the networks' coverage of their campaigns has been unreasonable. The networks contend that neither McCarthy nor Maddox represent significant viewpoints on the issue of who should be elected president. In this complaint McCarthy alleges that national polls show that he can anticipate only 10% of the vote of the general population.[8] The AIP states that Maddox is "unlikely to win the election." In light of these facts we cannot find that the networks were unreasonable in their decisions. Moreover, each is able to cite instances of coverage of both McCarthy and Maddox in its news programming.[9] Again, complainants have furnished no information which would indicate that this coverage is inadequate or unreasonable. In view of the foregoing, we are unable to find that there has been any violation of the fairness doctrine by NBC, CBS, ABC or PBS in their coverage of the compaigns of either McCarthy or Maddox.

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[8] See McCarthy complaint, appendix page 5; Opposition of NBC to McCarthy Complaint, p. 35.

[9] With respect to coverage of McCarthy see Opposition of NBC, Inc. to McCarthy Complaint, p. 29-31; CBS Opposition to Complaints p. 18-19; ABC letter concerning McCarthy complaint, p. 7, Response of PBS to McCarthy complaint p. 9. With respect to the coverage of Maddox see ABC's Opposition to Application for Review p. 16; Opposition of NBC Request for Relief, p. 21; CBS Opposition to complaints, p. 18-19. Also, see f.n. 10, *infra.*

22. In view of the foregoing, AIP's Application for Review IS DISMISSED (See f.n. 1. *supra*); the Broadcast Bureau's September 17, 1976 ruling IS AFFIRMED; and the above described complaints ARE DENIED.[10]

BY DIRECTION OF THE COMMISSION

Vincent J. Mullins
Secretary.

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[10] Filed on October 4, 1976 were two additional pleadings. CBS stated that Maddox and McCarthy appeared on adjacent *Face the Nation* programs on October 3, 1976.

AIP, in reply to the networks, states, *inter alia*, that the theatre where the debates were held (Walnut Street Theatre) "was designed and constructed so that theatregoers would be able to hear the . . . players without the use of microphones which were not even in existence when the theatre was first constructed." AIP asserts that the networks and the League fail "to explain away this fact" and that the "common sense conclusion is that the debates could have gone on without TV coverage." We believe this argument is irrelevant. This Commission would not second-guess the decision of the candidates or the League to delay the debate until the theatre public address system was working. Moreover, as indicated above, there is no evidence that the networks had any control over this matter.

APPENDIX B

Dissenting Statement of Commissioner Benjamin L. Hooks

In Re: Complaints of Eugene McCarthy and Lester Maddox Against the League of Women Voters and the Television Networks.

I do not blame the League of Women Voters which, in order to fit the cracked mold for a debate exemption from 47 U.S.C. §315(a)(4) devised by the Commission in its *Aspen Institute*[1] ruling, has had to engage in all manner of subterfuge and charade to make it appear that the current Presidential polemics are autonomous news events rather than the premeditated media extravanganza they clearly are to everyone still enjoying the blessings of earthly life.

We are all victims – the League, the candidates, the voters, the media – of the *Aspen* ruling which makes everyone *pretend* that these debates are a spontaneous occurrence (like a forest fire) or a routinely-scheduled newsworthy event (like the Super Bowl) which would have occurred anyway, with or without the conspired presence of the media. The world-at-large is not fooled into believing that these debates would have taken place without the direct involvement and commitment of the networks. However, like Shakespeare, the FCC by this action affirms that "(t)he play's the thing."

How much simpler and more conducive to honesty it would have been had the FCC not strained §315 and not preempted the Congress in providing any relief from §315 (as they

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[1] *Aspen Institute*, 55 FCC 2d 697 (1975) (Lee and Hooks, Com'rs., dissenting), *aff'd sub nom. Chisholm v. F. C. C.*, ____ F. 2d ____ (D. C. Cir. 1976), *reh. en banc denied*, May 13, 1976, *cert. pending*, Case No. 76-101, filed July 23, 1976, Case No. 76-205, filed August 11, 1976.

did in 1960 for the Nixon-Kennedy debates) that the legislature found appropriate. And, as I recently indicated in *WILM*,[2] I am certain that, had the candidates agreed to debate before the national television audience, a Congressional suspension would have been forthcoming faster than a Bionic 50-yard dash.

As it is, and without rearguing *Aspen Institute* which is now the law, the complainants here are most assuredly correct in asserting that the *bona fides* of these debates as self-operative news events is patently suspect and that even the Commission's §315(a)(4) exemption for news events not contrived by and for the media does not obtain.[3]

Accordingly, I dissent. In so doing, I reiterate that I do not necessarily blame the League or the media. Moreover, had the Congress suspended §315 and the networks been allowed to come out of the closet as the true superintendents, the complaint of the National Newspaper Publishers Association about the absence of Black correspondents might have been

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[2] *Delaware Broadcasting Company* (WILM), FCC 76-873, released September 21, 1976 (Lee and Hooks, Com'rs., dissenting) (in which the "live" aspect of the §315(a)(4) "on-the-spot" requirement affirmed in *Aspen* and *Chisholm*, n. 1 *above*, was deleted).

[3] In *Aspen* (and *aff'd* in *Chisholm*), the Commission (55 FCC 2d at 712) conditioned the use of the "on-the-spot coverage of *bona fide* news events" exemption of §315(a)(4) to the circumstances of *The Goodwill Station, Inc.*, 40 FCC 2d 362 (1965) in which the media did not control the formatic aspects of the program. And, as an indication of lack of broadcaster control, the "remoteness" of an event from the broadcast studio may be considered as in the instant case) as probative proof of the "independence" of the event from broadcast manipulation. As with the other (fast-disappearing) conditions of §315(a)(4) exemptions (see n. 2, *above*), this artifical "remote" condition is sheer flak, used at the time of *Aspen* to paper over the evisceration of §315(a).

unnecessary. I would hope that the networks would have been more sensitive to, and would have avoided, the all-white correspondent panels of the first two debates, thereby assuring that questions in the minds of millions of minority citizens would have been asked of the candidates.

APPENDIX C

United States Court of Appeals
For the District of Columbia Circuit

NO. 76–1915 September Term, 1976

Eugene McCarthy,
Appellant
v.
Federal Communications Commission,
Appellee

Filed October 6, 1976

George A. Fisher
Clerk

BEFORE: McGowan and MacKinnon, Circuit Judges

ORDER

Upon consideration of appellant's motion for consolidation and expedited treatment and appellant's motion for injunction pending review, it is

ORDERED, by the Court, that the motion for consolidation with No. 76–1865 is denied, and, it is

FURTHER ORDERED, by the Court, that the motion for injunction pending review is denied, and, it is

FURTHER ORDERED, by the Court, that the motion for expedited treatment is granted on the following terms. The FCC shall file the record of its proceedings immediately. Briefs from the FCC and intervenors shall be filed by noon, October 12, 1976. Appellant's reply brief shall be filed by noon, October 15, 1976.

The denial of appellant's motion for injunction pending appeal reflects this Court's doubts concerning the likelihood

that petitioner will prevail on the merits. *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). In affirming the Commission's earlier declaratory judgment that broadcasts of debates between political candidates may, under certain circumstances, be exempt from the "equal time" provision of the Communications Act of 1934, 47 U.C.S. § 315(a), this Court emphasized the latitude of the Commission's discretion to interpret and apply this provision. *Chisholm v. FCC*, NO. 75–1951, April 12, 1976, *affirming Aspen Institute Program on Communication and Society*, 55 FCC 2d 697 (1975). Appellant has not made a strong showing that the Commission's application of section 315(a) in this case will ultimately be held to be unreasonable. Nor is this Court persuaded on the record to date that appellant eventually will establish that constitutional considerations require an interpretation contrary to that of the Commission. Accordingly, an injunction pending appeal is inappropriate.

Per Curiam

MacKINNON, *Circuit Judge:* I concur in the judgment that the law does not permit this court, on the record before us, and under the present statute, to order additional participants into the debates between the candidates for the presidency of the two major parties.

As the opinion of the FCC states, the critical factor in "determining whether a debate comes within the section 315(a)(4) exemption is the role and the intent of the broadcaster in covering it" (FCC opinion at p. 8). That is a proper interpretation of the statute, but that is not to say that the complaint of the petitioners is not without considerable merit. To point out the situation the candidates are in, one need only examine the contention of the Columbia Broadcasting System (CBS) before the FCC in this case. CBS asserts that

> A broadcaster is *only* required to make reasonable judgments in good faith *as to the significance of a*

particular candidate and so decide how much time should be devoted to coverage of his campaign activities.

Thus, the broadcasters start out by determining how significant a particular *candidate* is. If they determine that *he* is not significant, then the amount of publicity he receives is greatly reduced – he may be effectively "frozen out" from any substantial news coverage during the entire compaign.

If the media had followed a different course and considered that the *candidate* was signficant and if the media had given his campaign the same amount of coverage as it did to other candidates, his candidacy might have become of greater "significance" and the candidate might have gone on to win, or to become a serious contender.

But under present practices, as outlined by CBS, a candidate is doomed at the very beginning to having his *personal significance* as a candidate judged by the broadcasters practically before he ever starts his campaign. Thereafter the coverage of the *issues* he raises is correspondingly greatly reduced, and as a candidate he is effectively frozen out of the political campaign by the media. While the present candidates, who are appellants in this proceeding, may by general estimates be far removed from having any reasonable chance to win, the media can just as effectively, behind the screen of "news judgment," by exercising their claimed evaluation of a candidate's personal "significance," reduce its coverage of candidates who might have a change to win, given fair coverage. And for CBS to argue that the petitioners have not "submitted any specific information to show that CBS's news judgments are unreasonable," merely compounds the error. Candidates that the media freezes out from the beginning will practically never be able to demonstrate that the media's news judgments are unreasonable because they can *never* show how significant their campaign might have become if they had received fair coverage from the beginning for the *issues* they raised. Thus, the media's early "evaluation" becomes a self-fulfilling prophesy.

The present campaign is a case in point. I venture to suggest that no person would contradict the statement that if one of the appellants received half as much coverage as the candidates of the two principal parties that his vote would be greatly increased.

However, present laws, in my opinion compel us to take the action we have taken today, and only Congress can change it.

APPENDIX D

United States Court of Appeals
For the District of Columbia Circuit

No. 76–1915 September Term, 1976

Filed October 21, 1976

Eugen McCarthy,
Petitioner

v.

Federal Communications Commission,
Respondent

George A. Fisher
Clerk

NBC, Inc.
Public Broadcasting Service
CBS, Inc.
American Broadcasting Companies, Inc.
Intervenor

Before: McGowan, Tamm and Leventhal, Circuit Judges

ORDER

On consideration of the briefs filed by all parties to this litigation, the motions to intervene and to supplement the motion to intervene filed by the American Independent Party, and of the record under review herein, it is

ORDERED by the Court that the motions of the American Independent Party are granted, and, it is

FURTHER ORDERED by the Court that the petition for review is dismissed and the Federal Communications Commission Order No. 76–924 is affirmed. It appears that petitioner McCarthy's and intervenor Maddox's legal rights under *Aspen*

Institute, 55 FCC 2d 697 (1975), *aff'd sub nom. Chisholm v. FCC*, No. 75-1951, D.C. Cir., April 12, 1976, *cert. denied*, No. 76–101, Oct. 12, 1976, and *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), can be satisfied by reasonable opportunities to have their views presented in contexts outside of the debates. Because there appears to be no lack of such opportunities, the Commission must be affirmed.

Per Curiam